the incorporation by reference of material filed in unofficial carrier tariffs or other documents, since the current language of subsection 221.177(b)(1) refers to notice of the possible incorporation of ''terms and conditions filed in public tariffs with U.S. authorities.'' Supporting ATA's request, AFA suggests that this reference be changed to cover unofficial tariffs filed with a recognized tariff publishing agent, or that a similar provision be made in proposed Part 292.

While the NPRM proposed a ''rule of construction'' in section 292.20 which would implicitly permit such incorporation by reference, subject to the various specific notice requirements set forth in section 221.177, we agree with the commenters that the final rule should be clarified in this and several other respects. We have decided to add provisions to Part 292 which will expressly authorize carriers exempt from filing tariffs under that Part to incorporate any terms by reference into their contracts for the carriage of cargo in scheduled foreign air transportation upon compliance with all of the notice, inspection, explanation and other requirements set forth in section 221.177.[16] Completing the basic parallel to 14 CFR Part 253, we will also expressly provide that shippers are not bound by incorporated terms unless the carrier complies with such requirements, and that the requirements are intended to preempt any State requirements governing incorporation of contract terms by reference. The NPRM contained a similar preemption statement in the explanatory section, but, given the concerns of the carriers and AFA on this subject, we will clarify our intention in Part 292 itself.

At the same time, we are not prepared to consider weakening the notice requirements contained in Section 221.177 to further simplify incorporation by reference of terms for cargo carriage. The graduated system of written notice and right of immediate inspection for most general terms coupled with direct notice and/or a right to immediate explanation of certain more important terms constitutes a deliberate balance between ease of contract formation and the importance of informed assent. Once on actual notice that terms may be incorporated by reference, the customer is under an obligation to inquire and understand them. A general desire to minimize necessary modifications to existing waybills is not, in our view, a justification for modifying this balance.[17]

American, and to some extent United, are also concerned that carriers will continue to face a public notice requirement that is currently satisfied by the filing of tariffs. American points to the statement in the NPRM that 14 CFR Part 249 and section 221.177 will continue to require each carrier, individually and through its agents, to maintain pertinent information on its cargo prices and rules, and to make that information available to the public upon request. The carriers have apparently misunderstood the scope of that statement, which was a narrow reference to the record retention requirements of Part 249 and the notice provisions of section 221.177 applicable solely in cases of incorporation by reference.[18] We construe the term ''tariff information'' in section 221.170 to mean tariffs filed with the Department. Thus, in their absence, there is no general ''duty'' to make such information public. Our experience with the elimination of domestic cargo tariffs and other tariffs has demonstrated clearly that carriers have ample marketplace incentives to disseminate their rates and rules as broadly as possible, and that the threat of administrative enforcement action to compel a general duty in this regard has little influence. Similarly, our experience has been that carriers have strong economic incentives to maintain evidence of past rates and rules, as well as specific waybills beyond the time requirement of Part 249, as a defense against litigation. Such evidence is discoverable by other parties in the event of litigation. Therefore, we have not proposed a general public notice requirement for exempted carriers, nor have the comments persuaded us that one is necessary.

2. Preemption. In addition to the requests of ATA, AFA, American, United, and IATA that the final rule make as clear as possible that State contract law requirements governing incorporation by reference differing from those in 14 CFR § 221.177 are preempted, several of these commenters have also expressed concern that the tariff exemption itself might be construed by some courts as evidence that State regulatory requirements might have increased applicability to airline activities. We do not believe such a concern to be well founded. While the legal effect of filed tariffs was at one time an important element in the consideration of the scope of federal preemption by the courts, Congress in 1978 adopted a broad preemption provision protecting the ''rates, routes and services'' of carriers with federal authority[19] in anticipation of the statutory sunset of domestic tariffs and other public utility regulation. The statute has been given a broad reading by the courts, most recently in American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 130 L. Ed. 2d 63 (1995). IATA's argument that the absence of a federal rules tariff facility ''actively supervised by the Department'' may generate unnecessary and costly litigation over both State contract and public utility law requirements ignores the fact that domestic cargo carriage has flourished without the benefit of either filed tariffs or federal incorporation rules for well over a decade. As noted above, domestic waybills do make some use of incorporation by reference. Some litigation may be inevitable in this area, in part because the statute also preserves many remedies at common law. However, we see no reason to assume that the elimination of the tariff requirement for cargo rules will result in an increased risk of litigation for the carriers.

3. Rates and other issues. Athearn, ISS and OFC, shipping consultants which, as part of their services, audit international shipping invoices to determine if their customers have been properly charged, all oppose the proposal.[20] In general, they contend that the proposal will deny shippers and/or their auditors the only assured, complete source of factual information on international carrier rates and rules; that carriers are reluctant to provide customers with precise rate information while cargo agents, whose commissions are based on gross sales, will not always quote the best rates; that existing alternative sources of tariff information,

[16] Amending section 221.177 itself is neither necessary nor desirable, since tariff-filing requirements could be reimposed in specific cases. To correct ambiguities in existing language, it is sufficient to provide in Part 292 that the sign required by subsection 221.177(a)(3) is not required of exempt carriers, and that notices required of such carriers under subsection 221.177(b) shall refer to the title or general nature of the publication or document containing the referenced terms rather than to ''terms and conditions filed in public tariffs with U.S. authorities.'' See section 292.21(a)(1).

[17] Moreover, a DOT rule defining tariffs published by carriers or their agents as ''official,'' ''filed,'' ''applicable'' or any other term suggesting legal effect in order to accommodate existing waybill language would be potentially misleading.

[18] Where no incorporation of rules by reference to unofficial sources is made, shippers will have direct notice of all contract of carriage terms on the waybill or other accompanying document.

[19] Now codified as 49 U.S.C. 41713.

[20] OFC also seeks an extension of the comment period, arguing that the proposal has not been well publicized among the shipping community. We do not believe such an extension to be necessary. The NPRM was published in the Federal Register, which is legal notice, and the breadth of the comments received indicates industry awareness of the proposal.